MINORITY REPORT OF THE SPECIAL COMMITTEE ON PRELIMINARY HEARINGS

The report of the Special Committee on Preliminary Hearings dated March 16th, 1982 was approved by all its members except Earl J. Levy, Q.C. and R. G. Thomas, Q.C. This minority report is presented by the aforementioned.

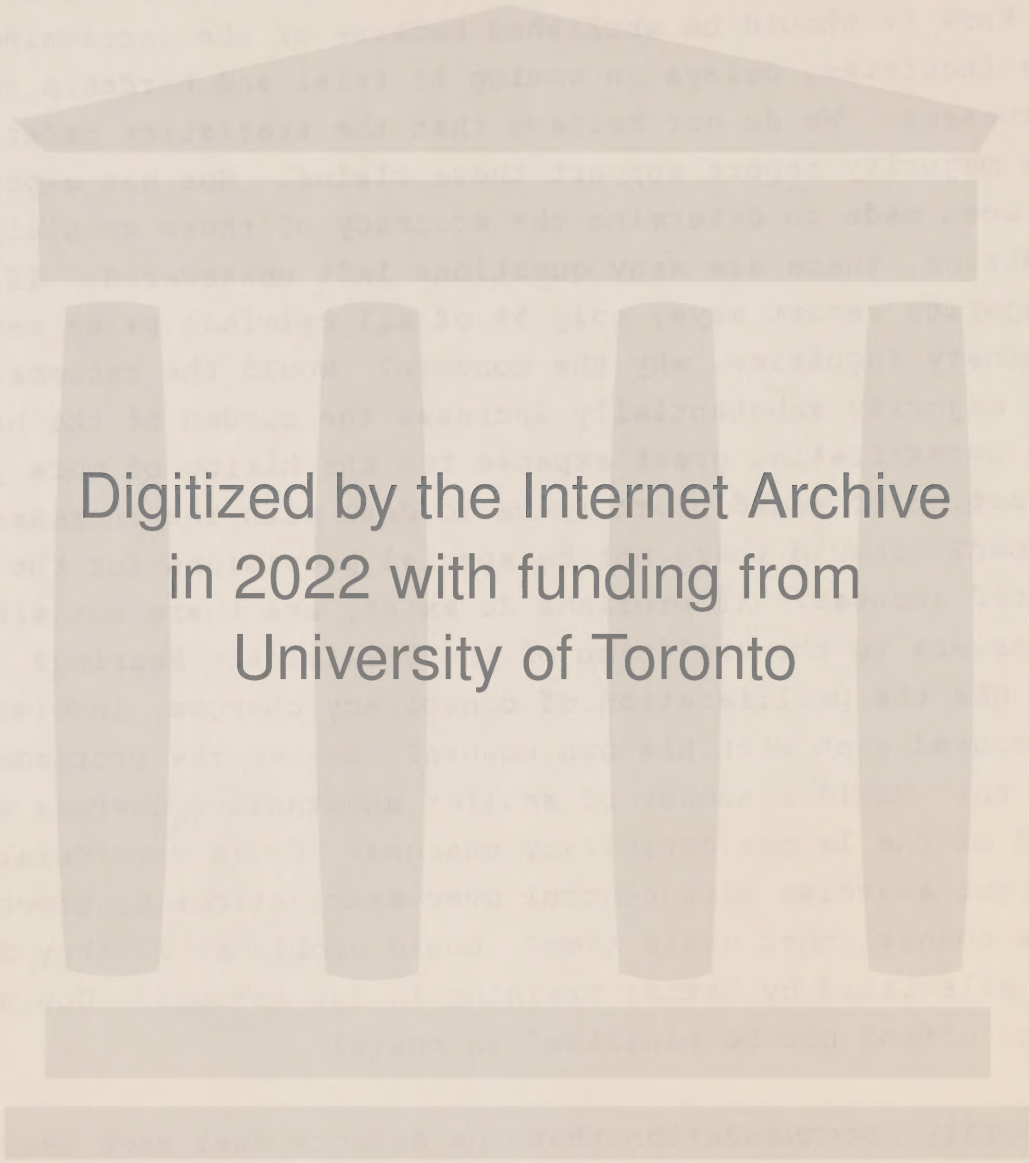
The Preliminary Hearing

The Preliminary Hearing has been a fundamental safeguard ensuring that no person should stand trial unless there has been a prima facie case proven. It has also been used to provide full answer and defence by allowing an accused to ascertain the case that has to be met, providing a foundation for an attack on a witness' credibility at trial and tieing a witness down on his evidence as well as providing evidence or leads to evidence unknown to the Crown or known but not disclosed which would assist the defence. The Preliminary Hearing has also served to save the time and expense of a trial: if the defence can determine at an early stage the weaknesses of the prosecution's case or lessen the impact of what on the surface appears to be a serious matter, which can only truly be determined through the cross-examination of the prosecution witnesses, the Crown may accept a plea to a lesser charge; defence counsel will be able to test what the client tells him against the evidence presented and a once reluctant client after hearing the evidence produced and cross-examined upon may wish to enter a plea of guilty; the Preliminary Hearing can also serve to define the issues more closely which can save time at trial. We feel, with the greatest of respect to the majority view, that it is an over-simplication (and lacking in proof) to say that in many cases Preliminary Hearings do not result in shorter trials. There are many trials that are destined to be long, and not for any reason relating to the Preliminary Hearing - for example, where there are many accused involved in

a conspiracy charge each represented by different counsel. The Preliminary Hearing can also preserve the evidence.

The majority report makes it clear that the Preliminary Hearing as we know it should be abolished because of the increasing length of the inquiries, delays in coming to trial and hardship imposed on witnesses. We do not believe that the statistics referred to in the majority report support these claims. Nor has a proper study been made to determine the accuracy of these complaints. In addition, there are many questions left unanswered. If, as the majority report says, only 5% of all criminal cases require Preliminary Inquiries, why the concern? Would the recommendations of the majority substantially increase the burden of the higher courts necessitating great expense for the hiring of more judges and creation of added court space to deal with the increased work load? Should there not be special provisions for the unrepresented accused? If problems do exist, are there not alternative answers to the abolition of the Preliminary Hearing? What effect has the proliferation of conspiracy charges, involving many accused each with his own counsel, caused the problems referred to? Would a number of smaller substantive charges suffice instead of the larger conspiracy charges? Could Provincial Court Judges not exercise more control over examinations by crown and defence counsel that waste time? Could problems, if they do exist, not be alleviated by better training in law schools? Could lawyers who offend not be penalized in costs?

The majority recommendation that the defence must seek leave to examine a witness with a review of this decision by the trial Judge with the power to declare mistrials where appropriate or permitting adjournments or holding voir dires where desireable to examine witnesses under oath in our view will not only be the time-consumer that the recommendations are seeking to minimize



but could be costly if mistrials are declared as well as causing inconvenience to jurors if remands to properly prepare were granted. We also feel that the sanction of a trial Judge making adverse comment on the failure of the Crown to make adequate disclosure is a hollow one if the undisclosed evidence carries any weight for the jurors.

The recommendations of the majority not only cast the burden on the defence to convince a Provincial Court Judge that they should have a right to know more about the evidence relating to their client but counsel in many cases will have to disclose the nature of its defence to the Crown in order to support its application to the Judge. This is a complete break from the deep-rooted philosophy of our criminal law. If the prosecution wishes to examine a witness under oath it need not make an application to the court as the accused must do. All that would be required is that the prosecution not file the witness' statement. This clearly places the prosecution's rights higher than the accused's. We cannot help but note how odd that in civil cases where money and property are at stake that there is an automatic pre-trial right to examine the litigants as well as, we are informed, proposed new widened rules to examine witnesses, but that in a criminal case where the liberty of an individual is at stake leave to examine witnesses whose evidence could cause a loss of that liberty must be obtained.

We are left with the feeling that the recommendations in the majority report reflect views that any existing problems are to be placed at the doorstep of defence counsel. Why else would defence counsel have to convince a Provincial Court Judge that he should have the right to examine a witness under oath with the Provincial Court Judge having the right to specify the scope of the examination when the Crown has the automatic right to examine a witness under oath

by not filing his statement? Why else would the majority report refer to "abuse by time consuming fishing expeditions and lengthy cross-examinations which serve no useful purpose" without reference to other reasons for the alleged problems which have arisen?

The English Experience

Because the draft majority majority report and subsequently the final report of the Special Committee appears to give much weight to the English experience Mr. Levy travelled to England on March 7th and over a period of several days attended a Magistrate's Court to see "paper committals" and interviewed Sir David Napley,[1] Mr. David Edwards, Secretary of the Law Society of England, Mr. Jeffrey McCann, Senior Legal Assistant of Metropolitan Police Solicitors, New Scotland Yard and other members of the staff,[2] Mr. Anthony Hooper,[3] and other senior and junior members of the English Bar, Detective Inspector Hunt and Detective Sergeant Rawling of the Norfolk Constabulary.

In referring to S. 2 of the Criminal Justice Act 1967 (reaffirmed in S. 6 of the Magistrates Court Act, 1980) the majority report notes that the defence can refuse to accept the statements of the witnesses and require the witnesses to be called subject to the right, according to R v Grays Justices, ex parte Tetley (1979) 70 Cr. App. R. 11, of the prosecutor not to call a witness if he can make out a prima facie case. The aforementioned judgment has been subject to strong criticism by the English Bar.[4]

However the Crown's failure to refuse to call certain witnesses at the request of the defence in R v Grays Justices, ex parte Tetley appears to be a rare exception to what actually occurs in

practice. According to all those interviewed including the solicitors for New Scotland Yard, the Crown almost invariably consents to calling a witness if the defence makes such a request, notwithstanding that the Crown must only prove a prima facie case and have supplied the defence with the statements of witnesses. It is this co-operation by the Crown which makes the English system work to the satisfaction of all concerned. This spirit of co-operation seems to be historical to the English system and may in part be due to the fact that defence counsel also act as prosecutors. Unfortunately experience here does not augur well for such commaraderie and understanding between Crown and defence counsel under the majority recommendations.

By this practice in England it is obvious the prosecution is prepared to presume the bona fides and competence of the defence bar generally notwithstanding that there are some complaints of awkwardness and lack of integrity on behalf of a few.

It would not be an understatement to say that each and every one of those interviewed in England including the solicitors for New Scotland Yard were strongly opposed to any suggestion that a defence counsel would have to seek leave of a judge before he could examine a witness at a Preliminary Hearing. Mr. Edwards, the secretary of the Law Society of England went so far as to opine that such a recommendation would never pass through the House of Commons.

Because the "paper committals" have been accepted by the Bar to a large extent over the "old-style" committals the Royal Commission on Criminal Procedure in January, 1981 recommended that committal proceedings be abolished subject to the right

of an accused to move for a discharge. This recommendation has been widely condemned by the English Bar. Hooper, in his paper, Discovery of the Prosecution Case in English Criminal Law, had this to say:

> "The Report, regrettably, contains only a brief account of the present position: indeed it does not even allude to those cases where the prosecution wished to call witnesses at the Preliminary Inquiry. The proposals have met with considerable opposition from the Criminal Bar Association and it is confidently expected that they will not be implemented."

Sir David Napley, in his letter of January 9th to The Times wrote that the Report refers to "ordered and directed acquittals in the Crown Court for insufficient evidence in 1978 were over 40% nationally and as high as 54% in one area" and that this "argues not for weakening but strengthening the sifting process. As the Commission rightly asserts this is due to lack of effective scrutiny of the case by the Prosecution and Defence and in a significant part of the failure of prosecution witnesses to give evidence in a satisfactory manner". According to Sir David Napley, since statistics show that the cost of a trial is estimated as being three times as much as a case before the Magistrate Court level the saving of money by abolishing the Preliminary Hearing is lost at trial because of so many directed acquittals.

The majority report seems satisfied with the quality of statement provided under the English system and makes specific reference to sample statements the Special Committee were shown from England. It should be noted that these statements comprised the anticipated testimony of police officers whose evidence concerned the setting up and continuity of wiretap evidence.

This type of evidence is rarely challenged by defence counsel and would normally be agreed upon, at least at the Preliminary Hearing stage. That evidence is easy to commit to paper. We feel that it would be much more difficult, if not impossible, to provide statements which would be sufficient to supplant cross-examination of such witnesses as accomplices, children of tender years, identification witnesses, police officers who have taken confessions, many victims as well as medical and forensic experts in certain instances. We seriously wonder whether police officers will be desirous of taking such detailed statements when they know defence counsel will have to make their application to examine the witness before the Provincial Court if they are not satisfied. Defence counsel will then have to depend on the disposition and competence of a particular Provincial Court Judge.

It was admitted by the officers of the Norfolk Constabulary who were reputed to be reasonable and fair that when they took a witness' statement they approached their questioning with a view slanted from centre towards the prosecution but that if the witness told them anything favourable to the defence it would be included. Any failure to do so would catch up with them at the trial. This would seem to accord with human experience with fair-minded officers. Police officers who are lazy or not fair-minded create different obvious problems. There will be times when the police officers who are not only inexperienced in legal niceties but who will not know what defence will be put forth will fail to ask some appropriate questions or fail to note what may be a significant answer. What is written in statements is often unreliable. How often have both defence counsel and Crown Attorneys who have had the benefit of a witness' will-say statement been surprised at how the witness' answer (a witness who is not hostile) turns out to be different than in the will-say statement. Statements

often contain rationalizations and planted suggestions by the police officers as well as disguised (not necessarily intentional) inadmissible evidence such as hearsay. The unreliability of these statements can only be demonstrated through cross-examination. Obviously a witness would be more careful if he was aware a statement had the effect of being under oath and it could make the police officer in our view more careful in taking the statement. This of course does not assist defence counsel who on cross-examination with respect to some new piece of evidence at trial is met with the reply - well, I was never asked that when I gave my statement. Finally, how effectively can one be cross-examined on a synopsis of his evidence, an unsigned statement or a will-say statement? It is our view that it will be too easy to present a prima facie case on paper and as a result we will have the same unsatisfactory situation referred to in the aforementioned letter by Sir David Napley - too many cases going to trial that should not.

Recommendations

> "When one speaks of changing or abolishing the Inquiry, one is questioning a whole procedural philosophy which has given expression to certain values considered important in the pre-trial phase of the criminal process. It is thus not solely the form of the Preliminary Inquiry that is involved here but also the fundamental principles which have justified its very existence".[5]

With great respect to the majority we feel that although complete pre-trial disclosure is a commendable objective the overhauling of a Preliminary Inquiry as proposed is too drastic a departure from fundamental principles as such a departure has not been proven necessary and in any event there are more acceptable alternatives. The goal to strive for in our view is the one that

is achieved in practice in England, namely pre-trial disclosure by providing witnesses' signed statements. We would also recommend disclosure of relevant material such as statements by an accused whether or not the Crown wishes to tender them, statements by co-accused, the accused's criminal record, the criminal record of Crown witnesses, relevant medical, laboratory and scientific reports, photographs, films, etc. Not only should statements be signed by witnesses but they and the police should be aware that any statements carry the sanctity of an oath and would suggest a certificate on the statement as is required in England, namely: "This statement consisting of pages each signed by me is true to the best of my knowledge and belief and I make it knowing that if it is tendered in evidence, I shall be liable to prosecution if I have willfully stated in it anything which I know to be false or do not believe it to be true". Defence counsel should after receipt of the statements advise which witnesses they wish to cross-examine but that in any event the Crown must prove a prima facie case unless defence consents to a committal by waiving the hearing of the evidence (except those witnesses the defence wishes to cross-examine). This recommendation presupposes that the Crown must prove a statement voluntary beyond a reasonable doubt in a voir dire unless waived by the defence. This has basically been the practice in homicide cases in Toronto where the Crown brief has been provided to defence counsel and in our view has been successful in shortening what would otherwise be lengthier Preliminary Hearings.

It is our view that the procedure recommended in this minority report should be subject to a trial period in order to see whether it gains acceptance from participants of our adversary process. This recommended procedure accepts that counsel will act with competence and responsibility and that the balance between the interests of the accused and the public will be served. If pre-trial disclosure can achieve the limits hoped

for, then we would envisage a significant reduction in the length of Preliminary Hearings while at the same time maintaining a fundamental safeguard for the accused.

We would also make the following recommendations:

(1) Recognizing that there are a small number of counsel who are not carrying out their duties responsibly we would suggest that the Provincial Court Judge and the trial Judge have the power to request that counsel be asked to show cause in chambers why they should not be personally taxed in costs for work not reasonably or necessarily done at the Preliminary Hearing stage or at trial with the right of appeal to a Legal Aid body or the Taxing Master. This type of procedure is available in England;

(2) Provincial Court Judges should exercise more control over counsel who carry on rambling examinations which serve no purpose;

(3) That the Legal Aid tariff specifically set out a benefit for a proper plea of guilty. We are informed this benefit is not unknown to the civil law where counsel are paid for settling law suits when taxing costs;

(4) Crown Attorneys and police officers are not immune from criticism. Some Crown Attorneys in our view at times tend to present too much irrelevancy at the Preliminary Inquiry. Over charging is not uncommon. The laying of conspiracy charges involving a large number of accused and defence counsel when smaller substantive counts would suffice in our view is no small problem, particu-

larly with drug cases. In such cases a Provincial Court Judge or trial Judge should have the right to tax costs against the Crown Attorney.

(5) The law schools should provide better training in the practical aspects of conducting a trial.

FOOTNOTES

1. Solicitor and senior partner in Kingsley, Napley and Company; President of the Law Society, 1976-77; President, London (Criminal Courts) Solicitors Association, 1960-3; Chairman, Executive Council, British Academy of Forensic Sciences 1960-74; Chairman Law Society's Standing Committee on Criminal Law 1963-76; Member, Editorial Board, Criminal Law Review, Legal Aid Committee 1969-72; Member, Home office Law Revision Committee, 1971; Author: Crime and Criminal Procedure 1963; Guide to Law and Practice Under the Criminal Justice Act, 1967; The Technique of Persuasion, 1970, 2nd edition 1975; a section, Halsburys Law of England.

2. Solicitors in England may appear at the Magistrates Court level. Barristers are retained for each case by the Metropolitan Police Solicitors to prosecute cases either from the Magistrates Court level or after committal.

3. Now a practicing barrister in London, England. Formerly professor of law at Osgoode Hall Law School, University of British Columbia and visiting professor of law at Laval University.

4. Examples can be found in Hooper's paper, Discovery of the Prosecution Case in English Criminal Law and in a letter from Sir David Napley to The Times on January 9th, 1981.

5. 1974 Law Reform Commission of Canada Study Report of Discovery on Criminal Cases, p. 64.